

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

COUNTY OF MENDOCINO,

Plaintiff,

v.

WILLIAMS COMMUNICATIONS,
et al.,

Defendants.

No. C 05-4429 PJH

**ORDER GRANTING PARTIAL SUMMARY
JUDGMENT AND GRANTING MOTION
FOR LEAVE TO AMEND**

Defendant's motion for partial summary judgment came on for hearing before this court on April 5, 2006. Plaintiff appeared by its counsel, Deputy County Counsel Wendy L. Haskell, and defendant appeared by its counsel Michael G. Thornton. Having read the parties' papers and carefully considered their arguments and the relevant legal authority, and good cause appearing, the court hereby GRANTS the motion as follows and for the reasons stated at the hearing.

Also before the court is plaintiff's motion for leave to amend the complaint, previously noticed for hearing on April 19, 2006. For the reasons stated below, the court finds that the motion should be GRANTED.

BACKGROUND

This is a case alleging violations of the terms of an encroachment permit issued to Williams Communications ("Williams") by plaintiff County of Mendocino ("the County"). The County originally filed this action against Williams and Wiltel Communications Managed Services of California, Inc. As the result of a series of name changes and reorganizations, an entity known as WilTel Communications, LLC ("WilTel") is now the sole defendant.

In April 2000, Williams applied for an encroachment permit from the Road Division of the Mendocino County Department of Transportation. Williams was seeking to install approximately 65 miles of fiber optic telephone cable over two separate routes on various County roads, as part of its construction of a nationwide fiber optic network. The County required that Williams obtain the permit and pay a permit fee of \$153,694 before carrying out the construction.

On May 16, 2000, the County issued the permit. The permit included eight "Special Conditions," one of which required Williams to "be responsible for full restoration of all damaged portions of County Roads which are attributable to this project either directly (resulting from trenching, facility installation, or backfilling operations) or indirectly (resulting from heavy equipment traffic due to disposal of materials or transporting facilities or backfill materials to the jobsite)."

The permit also included a number of "General Provisions," one providing that "[a]ll work shall be done subject to . . . the satisfaction of the [County]," and another requiring that the road surfacing be replaced "equal to or better than the surfacing disturbed." A third "General Provision" provided that "[a] permit shall not be effective for any purpose unless and until [Williams] files with [the County] a surety in the form and amount required by [the County], unless specifically exempted on the face of said permit." The permit itself stated that "the amount of surety for work authorized by this permit shall be \$N/A."¹

The County had the roads inspected following the completion of Williams' work in

¹ According to the County, it was prohibited from the posting of a bond by California Streets & Highways Code § 1468.

1 2001. The County claims that the inspection found major damage to Fish Rock Road and
2 Mountain View Road. On March 12, 2002, the County made a formal demand on Williams
3 requesting that it comply with the conditions of the permit and restore the roads to their
4 previous condition. In May 2002, the County made a second demand. However, Williams
5 apparently never made the repairs to the roads.

6 The complaint in this action was filed in Mendocino County Superior Court on
7 October 14, 2005, alleging two causes of action – breach of contract and violation of law.
8 WiTel removed the case on November 1, 2005, and then filed a motion to dismiss the
9 second cause of action. The County withdrew the second cause of action on November
10 28, 2005, and the court granted the motion to dismiss. The dismissal of the second cause
11 of action left only the claim for breach of contract, in which the County asserts that Williams
12 failed to carry out the work in accordance with the terms of the encroachment permit, and
13 claims that it was damaged as a result of Williams' "breaching the permit."

14 On December 19, 2005, WiTel filed an answer and counterclaims, alleging that the
15 requirement that Williams pay the \$153,694 permit fee was unlawful under California Public
16 Utilities Code § 7901 and California Government Code § 50030; and alleging that the
17 County's requirement that Williams pay the permit fee before Williams would be permitted
18 to install its fiber optic cable violated 47 U.S.C. § 253 because it had the effect of
19 prohibiting Williams from providing interstate and intrastate telecommunications service.
20 WiTel seeks compensatory damages and a declaratory judgment that the claims of the
21 County asserted in this action are barred by the provisions of 47 U.S.C. § 253, by the
22 Supremacy Clause of the United States Constitution, by California Public Utilities Code
23 § 7901, and by California Government Code § 50030.

24 On February 23, 2006, WiTel filed a motion for summary judgment. A week later, at
25 the March 2, 2006, initial case management conference, the court set discovery cut-off for
26 November 17, 2006. On March 15, 2006, the County filed an opposition to the motion for
27 summary judgment, and also filed a motion for leave to amend the complaint.
28

DISCUSSION

A. Defendant's Motion for Summary Judgment

1. Legal Standard

Summary judgment is proper where the pleadings, discovery, and affidavits show that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Material facts are those that may affect the outcome of the case. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A dispute as to a material fact is genuine if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. Id.

The party moving for summary judgment bears the initial burden of identifying those portions of the pleadings, discovery, and affidavits which demonstrate the absence of a genuine issue of material fact. See Celotex Corp. v. Cattrett, 477 U.S. 317, 323 (1986). Where the moving party will have the burden of proof at trial, it must affirmatively demonstrate that no reasonable trier of fact could find other than for the moving party. But on an issue for which the opposing party will have the burden of proof at trial, the moving party need only point out "that there is an absence of evidence to support the nonmoving party's case." Id.

2. WilTel's Motion

WilTel now seeks summary judgment on the County's breach of contract claim. WilTel contends that there are no disputed material facts, and asserts that summary judgment is appropriate because a permit is not a contract and violation of the terms of the encroachment permit therefore cannot constitute breach of contract and does not entitle the County to recover damages.

WilTel asserts that the words "permit" and "license" are used interchangeably in cases analyzing their legal effect, and contends that under California law, a license, which simply allows an entity to pursue a regulated activity, has none of the elements of a contract and does not confer an absolute right, but rather a personal privilege to be exercised under existing restrictions and under any other that may reasonably be imposed.

1 The County argues, however, that a permit and a license are not the same – that a
2 permit is a “contractual agreement with a governmental entity,” while a license is not. The
3 County contends that the encroachment permit contained all the elements of a contract
4 under California Civil Code § 1550: 1) parties capable of contracting, 2) consent of the
5 parties, 3) lawful object, and 4) sufficient consideration. The County asserts that both
6 parties were capable of contracting and both consented to the agreement, that the purpose
7 of the agreement was legal, that there was sufficient consideration (payment of the
8 \$153,694 permit fee). Citing Mendocino County Code §§ 20.308.055 and 20.532.010, the
9 County asserts that it was free to grant or deny the application for the permit, because the
10 project was partially in the Coastal Zone.

11 The County contends that the facts in the present case support the conclusion that
12 the permit issued to Williams was more like a contract than a license. In particular, the
13 County emphasizes what it terms the “negotiations” that led to the parties’ agreement that
14 is embodied in the encroachment permit. Christopher Rau, the Mendocino County
15 Department of Transportation employee responsible for issuing the permit to Williams,
16 states in a declaration that he was involved in negotiations for several months with
17 employees of Williams regarding the conditions that would be attached to the permit. He
18 claims that it was as a result of these negotiations that the parties agreed that Williams
19 would pay for an engineering firm to oversee its work, would return the roads to the
20 condition they were in prior to commencement of the project, would pay for monitors to
21 ensure that the environment would be protected, and would complete the work in a specific
22 manner.

23 Rau maintains that the County did not impose these conditions on others seeking
24 encroachment permits, and claims that Williams agreed to the conditions so that it could
25 obtain the right to place its fiber optic cable in the County. Rao also asserts that he was
26 required to closely monitor the work being done on the County’s roads – not something he
27 usually did in connection with an encroachment permit – and that the County also entered
28 into a special contract with an engineering firm to monitor Williams’ work.

1 The parties have provided no evidence establishing any disputed material issues of
2 fact, and the court finds that the motion must be GRANTED. The encroachment permit
3 was not a contract for at least three reasons. First, a permit is not a contract under
4 California law, and the County cites no persuasive authority to the contrary. Second, there
5 is no evidence showing that the parties viewed the permit as a contract, and all indications
6 are that they viewed it as a permit. Third, the permit does not appear to meet the other
7 elements of a contract.

8 First, under California law, neither a license nor a permit is considered a contract.
9 In Rosenblatt v. Calif. State Bd. of Pharmacy, 69 Cal. App. 2d 69 (1945), the plaintiff filed
10 suit to compel the State Board of Pharmacy to issue him a renewal of his license as an
11 assistant pharmacist. His license had been revoked because the State eliminated the
12 provision for registering "assistant" pharmacists (those who had completed only one-half of
13 the course work required for graduation from a school of pharmacy). The plaintiff argued
14 that a license issued to one who meets the requirements of the authorizing statute, and
15 thereafter is used by him as a means of earning a living, becomes a vested right. The
16 California Court of Appeal held that "a license from the state issued in the exercise of its
17 police powers permitting the doing of that which without the license would be unlawful is not
18 a contract and does not convey a vested right," has "none of the elements of a contract,"
19 and "does not confer an absolute right but a personal privilege to be exercised under
20 existing restrictions." Id. at 73-74.

21 In US Ecology, Inc. v. State of Calif., 92 Cal. App. 4th 113 (2001), the court held that
22 a license to operate a low-level radioactive waste disposal facility was not a contract. Id. at
23 129 (citing Rosenblatt, 69 Cal. App. 2d at 74). In Irvine v. State Bd. of Equalization, 40 Cal.
24 App. 2d 280 (1940), the California Court of Appeal held that there is no inherent right in a
25 citizen to sell intoxicating liquors, and a license to do so is not a "contract," but is a "permit"
26 to do what would otherwise be unlawful. Id. at 284; see also Saso v. Furtado, 104 Cal.
27 App. 2d 759, 764 (1951) (liquor license is not a proprietary right within the meaning of the
28 due process clause of the California Constitution, and is not a contract; rather it is a permit

to do what would otherwise be unlawful).

California courts have also specifically held that permits are not contracts. In County Sanitation Dist. v. Superior Court, 218 Cal. App. 3d 98 (1990), the court held that a waste water discharge permit was not a contract. Id. at 108. In Scott-Free River Expeditions, Inc. v. County of El Dorado, 203 Cal. App. 3d 896 (1988), the court held that a county permit authorizing use of a navigable river for commercial rafting was not a contract within the meaning of the California Revenue and Taxation Code, because “a contract requires consideration” and the plaintiffs had not suggested any consideration for their exclusive use of the river. Id. at 913. Further, in 1950, the California Attorney General issued an opinion stating that a licence or permit issued by the State in exercise of its police power, permitting conduct of activity otherwise unlawful, is not a contract and confers no vested right in the sense that the law under which it is passed cannot ever be amended or repealed. 16 Ops. Atty. Gen. 29, 30 (Opinion No. 50-113, July 28, 1950) (citing Rosenblatt and Vincent Petroleum Corp. v. Culver City, 43 Cal. App. 2d 511 (1941)).

The only cases cited by the County in support of its argument that the encroachment permit was a contract – In re Lorber Indus. of Calif., Inc., 675 F.2d 1062, 1067 (9th Cir. 1982), and Ihrig v. New York Atlantic-Inland, Inc., 176 A.D.2d 1160 (1991) – are not persuasive authority.

The issue in In re Lorber Industries was whether sewer use fees claimed by a county Sanitation District from a debtor in bankruptcy were “debts” (without priority in bankruptcy) or taxes (entitled to preference over other debts). The Ninth Circuit concluded that the sewer use fees were not taxes, but were

fees for services provided to the industrial users of the system. The specific services, processing and disposal of excess wastewater, are provided to industrial users, rather than to the general local population. Amounts specifically charged for those services are by nature a debt obligation, based on a contractual agreement, the application for and issuance of a permit. The source of the obligation is not the authorizing legislation, but Lorber's decisions to acquire a permit and to engage in a high level of system use.

In re Lorber Indus., 675 F.2d at 1067. The court noted in a footnote that while the debtor Lorber had obtained a permit, the imposition of charges on non-permit users would not

1 transform the charges into taxes because the non-permit user who discharges into the
2 system also incurs a debt obligation, based on implied contract. Id. n.4.

3 In other words, the fact that Lorber obtained a “permit” to sign up for sewer service
4 did not change the fundamental arrangement of payment for utility services provided –
5 which was a debt arising out of the “contractual” agreement to pay for the services on an
6 ongoing basis – because Lorber’s position was the same as that of any other user of
7 utilities. In that regard, Lorber’s reference to “the application for and issuance of a permit”
8 as somehow reflecting a “contractual agreement,” cannot be viewed as a holding that a
9 permit is a contract.

10 Moreover, the California Court of Appeal in County Sanitation Dist. v. Superior
11 Court, 218 Cal. App. 3d 98 (1990) criticized Lorber, on the basis that the Ninth Circuit’s
12 statement that the charges were based on a contractual agreement was not necessary for
13 a determination of the main issue in the case, and was, therefore, dicta; and on the basis
14 that the Ninth Circuit failed to set forth any analysis to support its bare conclusion that the
15 “application for and issuance of a permit” was a “contractual agreement,” such that the
16 unpaid service charges became a “debt obligation.” Id. at 108-09.

17 In Ihrig, a New York case, the Town of Cobleskill contracted with New York
18 Atlantic–Inland, Inc., to issue building permits and perform construction inspections.
19 Plaintiffs, residents of Cobleskill, sued New York Atlantic for inadequate building inspection.
20 One of the plaintiffs’ theories in that case was that they were third-party beneficiaries of the
21 contract between Cobleskill and New York Atlantic. However, the trial court dismissed that
22 cause of action, and the dismissal was affirmed by the Appellate Division. Ihrig, 176
23 A.D.2d at 1163. The court in Ihrig made no finding that the building permit was a contract,
24 and that case therefore has no bearing on the dispute in the present case.

25 Second, there is no indication that WilTel and the County viewed the permit as a
26 contract. The application for the permit is entitled “Standard Encroachment Permit
27 Application,” and states, “In compliance with the Mendocino County Code and the
28 California Streets and Highways Code, the undersigned hereby applies for permission to

1 construct the following improvement or otherwise encroach upon a County Road
2 Reservation or Right of Way” The attached “General Provisions” state, “A permit is
3 issued under the provisions of Chapter 5.5 of Division 2 of the California Streets and
4 Highways Code and Chapter 15.20 of Volume 1 of the Mendocino County Code.”

5 The referenced provisions of the Streets and Highways Code and the Mendocino
6 County Code provide as follows. Chapter 5.5 of Division 2 of the Streets and Highways
7 Code authorizes the county road commissioner to “issue written permits, as provided in this
8 chapter, authorizing the permittee to [among other things,] . . . [m]ake an opening or
9 excavation for any purpose in any county highway,” or “[p]lace, change or renew an
10 encroachment.” Cal. Sts. & High. Code § 1460. In addition, “[a]ny act done under the
11 authority of a written permit, issued pursuant to the provisions of [Chapter 5.5], shall be
12 done in accordance with the applicable provisions of [Chapter 5.5], and the terms and
13 conditions of such permit.” Cal. Sts. & High. Code § 1461. Any permit issued under the
14 provisions of Chapter 5.5 “may provide that the permittee will pay the entire expense of
15 replacing the highway in as good condition as before, and may provide such other
16 conditions as to the location and the manner in which the work is to be done as the road
17 commissioner finds necessary for the protection of the highway.” Cal. Sts. & High. Code
18 § 1462.

19 Chapter 15.20 of the Mendocino County Code provides that “[t]he purpose of this
20 Chapter shall be deemed to supplement Sections 1480 to 1496, inclusive, of Chapter 6,
21 Division 2 of the [California] Streets and Highways Code.” Mendocino County Code
22 § 15.20.020. Chapter 6, Division 2, of the California Streets and Highway Code defines
23 “encroachment” as “any structure or object of any kind or character placed, without
24 authority of law, either in, under or over any county highway.” Cal. Sts. & High. Code
25 § 1480(b). Mendocino County Code Chapter 15.20 provides further that “[n]o person shall
26 construct new road or driveway approaches to any County highway or install any culvert or
27 pipe within the right of way of any County highway, without first securing a permit for that
28 purpose, from the Road Department of the County of Mendocino.” Mendocino County

1 Code § 15.20.030.

2 In short, the application states that Williams applied for an encroachment permit; and
3 the permit itself states that it is an “encroachment permit,” issued pursuant to State and
4 County laws governing the issuance of encroachment permits. Those laws prohibit the
5 making of any opening or excavation in any County highway without a permit. Williams
6 applied for a permit, and the County issued a permit – there is no evidence that the parties
7 intended to enter into a contract.

8 Any negotiations as to the terms of the permit are irrelevant regardless of what was
9 discussed. The actual wording of the permit shows that the so-called negotiation involved
10 only the imposition of additional burdens on WilTel, and that the only terms of the permit
11 that the County relies upon in its contract claim (performance of the work to the satisfaction
12 of the County, and replacement of the road surface to equal or better than the original road
13 surface) are not in the negotiated Special Conditions but rather in the printed form General
14 Conditions. Moreover, the County cites no authority supporting the proposition that
15 negotiating the terms or conditions of a permit will transform the permit into a contract.

16 Third, the permit does not appear to meet the other elements of a contract. For
17 example, the permit states in the General Provisions that it is revocable on five days notice
18 (“[e]xcept as otherwise provided for public agencies and franchise holders”). Thus, it is not
19 legally enforceable in the same way as a contract. Moreover, the County has not
20 established that it was free not to enter the supposed “contract.” As a public entity, the
21 County is required to issue permits to anyone who submits a proper application and
22 qualifies for the permit under the law.

23 The County argues that under Mendocino County Ordinances §§ 20.308.055 and
24 20.532.010, it was free to exercise its discretion to deny the application. However, as
25 WilTel has pointed out, the County has not identified the applicable sections or subsections
26 of the cited ordinances. Thus, the court cannot determine whether they support the
27 County's position. Section 20.308.055 provides a list of “definitions,” none of which seem
28 to apply here. Section 20.532.010 states that if a coastal permit is required under Section

20, then no building permit, encroachment permit, or any of several other types of permits and licences shall be issued prior to the issuance of the coastal permit. That section does not support the County's argument.

WilTel's initial argument, and the one on which the rest of its argument partially rests, is the claim that the term "permit" and the term "license" are used interchangeably in the cases analyzing their legal effect. It is true that some sources state that a permit is a license, while others state that a license is a permit. Black's Law Dictionary defines "permit" as "[a] certificate evidencing permission; a license," and defines "license" as "[a] revocable permission to commit some act that would otherwise be unlawful" and "[t]he certificate or document evidencing such permission." Black's Law Dictionary (7th ed. 1999). In People ex rel. Dept. of Public Works v. DiTomaso, 248 Cal. App. 2d 741 (1967), the court stated that "a permit granting an encroachment constitutes a mere revocable license which may be withdrawn at will." Id. at 750.

In Irvine, the court described a State-issued liquor "license" as a "permit" to do what would otherwise be unlawful. Irvine, 40 Cal. App. 2d at 284. At least one California statutory provision, California Insurance Code § 1627, states that "[a] license is a permit to act in the capacity specified herein" (referring to persons licensed as life agents or fire and casualty broker-agents). The California Supreme Court, in discussing the legality of a license tax imposed on attorneys by the City of Sonora, stated that "[a] license in its proper sense is a permit to do business which could not be done without the license." City of Sonora v. Curtin, 137 Cal. 583, 585 (1902). The California Court of Appeal, in discussing the revocation of an oil well drilling permit issued by the City of Culver City under what is referred to in the opinion as a "licensing ordinance," stated that

[a] license is only a permit to do a particular thing, and it is not property in any legal sense. It is a mere privilege granted by the municipal officer empowered to issue it, and is always revocable; the correlative power to revoke a license being a necessary consequence of the power to grant it.

Vincent Petroleum, 43 Cal. App. 2d at 517 (citation and quotation omitted).

While it may not be strictly true that "license" and "permit" are used interchangeably,

1 the two terms have essentially the same meaning – an approval or authorization from the
2 controlling governmental entity to do what would be unlawful in the absence of the license
3 or permit. Thus, in general, any case holding that a license is not a contract – such as
4 Rosenblatt – would in the court's view also apply to a case involving a permit.

5 B. Plaintiff's Motion for Leave to Amend the Complaint

6 1. Legal Standard

7 Federal Rule of Civil Procedure 15 requires that a plaintiff obtain either consent of
8 the defendant or leave of court to amend its complaint once the defendant has answered,
9 but "leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a); see also,
10 e.g., Morongo Band of Mission Indians v. Rose, 893 F.2d 1074, 1079 (9th Cir. 1990) (leave
11 to amend granted with "extreme liberality"). Leave to amend is thus ordinarily granted
12 unless the amendment is futile, would cause undue prejudice to the defendants, or is
13 sought by plaintiffs in bad faith or with a dilatory motive. Foman v. Davis, 371 U.S. 178,
14 182 (1962); DCD Programs, Ltd. v. Leighton, 833 F.2d 183, 186 (9th Cir.1987).
15 Amendments seeking to add claims are to be granted more freely than amendments
16 adding parties. Union Pacific R. Co. v. Nevada Power Co., 950 F.2d 1429, 1432 (9th Cir.
17 1991).

18 2. The County's Motion

19 On the day it filed the opposition to WilTel's motion for summary judgment, the
20 County also filed a motion for leave to amend the complaint. The County seeks leave to
21 amend to add three new causes of action – (1) violation of law (Streets and Highways Code
22 § 1462, which states that encroachment permits may provide that the permittee will pay the
23 entire expense of replacing the highway in as good condition as before); (2) injunctive
24 relief; and (3) fraud (claiming that defendant promised to replace the highway in as good
25 condition as before, and that the County relied on this assurance in issuing the permit).
26 The proposed amended complaint also asserts the original cause of action for breach of
27 contract, on which summary judgment has now been granted.

28 The County argues that none of the factors that militate against allowing amendment

1 are present here – undue delay, bad faith or dilatory motive, repeated failures to cure
2 deficiencies by amendment, undue prejudice to opposing party, or futility of amendment.
3 However, other than reciting the factors and claiming that they are not present, the County
4 provides no specific argument or analysis.

5 In opposition, WilTel argues that all the factors are present, and that the motion
6 should be denied. First, WilTel contends that the County delayed unduly in seeking leave
7 to amend, as the County was aware of all the facts on which the proposed amendment is
8 based at the time the complaint was filed. WilTel notes that the County has offered no
9 explanation as to why the request for leave to amend was not filed sooner, suggesting that
10 it is improper for the County to seek to change the theory of the case without making a
11 showing of a change in knowledge or other conditions over which the County had no
12 control.

13 WilTel contends that the courts look with disfavor on motions to amend that are not
14 made until after the opposing party has moved for summary judgment. WilTel
15 acknowledges that in most such cases, discovery had been completed when the motions
16 for summary judgment were filed and the motions for leave to amend were made.
17 However, the County asserts, while discovery has not been completed in this case,
18 discovery is not an issue as to the County's proposed claims. WilTel contends that all the
19 relevant facts have been known to the County "for years," in that the roads involved are
20 located in the County of Mendocino, and the County can have the roads tested and
21 examined by experts any time it wants and has apparently already done so. WilTel also
22 claims the witnesses involved are past or present County personnel. WilTel asserts that
23 completion of discovery is not going to add or change any facts on which the County
24 asserts that its claims are based.

25 Second, WilTel argues that it would be unduly prejudiced if the court allowed the
26 County to amend the complaint, because "the action will have to largely start over, and
27 much of the effort devoted to the case during the past six months will have been wasted."
28 WilTel complains, for example, that it will have to file another motion to dismiss for failure to

1 state a claim, and that if all the claims are not dismissed at that point, the parties will have
2 to exchange additional disclosures and new discovery will have to be propounded.
3 According to WilTel, this will set the case back “by months,” and the court’s pretrial order
4 will undoubtably have to be changed due to the additional time required for motions and
5 additional discovery, including, with regard to the fraud claim, the time required for WilTel to
6 locate its witnesses, most of whom no longer work for WilTel and who may be difficult to
7 find. WilTel maintains that the costs of such additional proceedings and the cost of
8 needlessly lengthening this litigation would not have been incurred if the County had
9 pleaded all its theories when it filed the original complaint.

10 Third, WilTel argues that the proposed amendment would be futile. The first claim in
11 the proposed amendment is the same breach of contract claim on which the court has
12 already granted summary judgment. The second claim is based on a statute that provides
13 that encroachment permits “may provide that the permittee will pay the entire expense of
14 replacing the highway as in good condition as before.” WilTel contends that plaintiff has
15 not claimed that WilTel’s replacement of the roadway was below the industry standard for
16 digging, refilling, or replacing trenches; or that WilTel was negligent in the performance of
17 its work; or that any structural defects have appeared in the roadways since the time that
18 WilTel did the work. According to WilTel, the only way the repaired roads are not in “as
19 good condition as before” is cosmetic, because the resurfaced trenches are a different
20 color than the original pavement installed years before, or may have some “non-structural
21 cracks” or other unattractive qualities.

22 WilTel contends, however, that “as good as before” should not require complete
23 repavement of the roads, which is what WilTel claims the County really wants. WilTel
24 argues that requiring complete repaving of any roadway where fiber optic cable is installed
25 would have the effect of prohibiting WilTel or any other telecommunications company from
26 providing interstate and intrastate communications services, particularly in remote areas
27 like Mendocino County. WilTel asserts that any requirement that has that effect would be
28 unlawful under 47 U.S.C. § 253, and that the claim would therefore be futile.

1 The third claim in the proposed amended complaint seeks an injunction to compel
2 WiTel to return the roads to "as good condition as before," and does not allege any other
3 facts beyond those alleged in the first and second causes of action. Thus, WiTel argues
4 that this claim would be futile.

5 The fourth claim in the proposed amended complaint alleges that WiTel fraudulently
6 represented that the roads would be returned to a condition better than they were prior to
7 WiTel's work. WiTel argues that this is a failed attempt to plead a claim of promissory
8 fraud. WiTel contends that the fourth cause of action does not plead fraud with specificity,
9 as required by Federal Rule of Civil Procedure 9(b), because the County does not specify
10 who spoke to whom, or precisely what was said. In addition, WiTel argues, the claim does
11 not adequately plead reliance. According to WiTel, the assertion that the County would not
12 have issued the encroachment permit in the absence of WiTel's representations is not true,
13 because the County was required to issue the encroachment permit, and because failure to
14 do so would have violated 47 U.S.C. § 253.

15 In reply, the County argues that WiTel will not be prejudiced if the motion to amend
16 is granted at this stage of the litigation. The County argues that WiTel cannot show that
17 the County delayed in filing this motion, nor that the motion was filed in bad faith. The
18 County asserts that in the cases where courts found that the plaintiff had delayed unduly,
19 more than two years has elapsed between the filing of the complaint and the filing of the
20 motion for leave to amend. Also, in many cases, discovery had closed. By contrast, the
21 County argues, it filed this motion within two weeks of the date that discovery opened, and
22 only after having had the opportunity to receive and review WiTel's initial disclosure
23 statement. The County asserts that allowing the amendment will not affect discovery, as
24 discovery has barely begun, no depositions have been scheduled, and neither party has
25 responded to any discovery request.

26 The County also contends that this case is distinguishable from those cases where
27 courts found amendment was not proper where a motion for summary judgment was
28 pending, because in this case, WiTel filed its motion for summary judgment a week before

1 the initial case management conference. The County argues that it would be unreasonable
2 to expect that it could have discovered new issues and filed its motion for leave to amend
3 before that point.

4 The County argues that the proposed amendment would not be futile. With regard
5 to the “violation of law” claim, the County disputes WilTel’s assertion that the problems with
6 the roads are merely “cosmetic.” The County claims that the roadways are cracked, are
7 raised in areas where they were not previously raised, and are in disrepair. The County
8 argues that WilTel had a duty under California law to return the roads to their previous
9 condition, and that WilTel failed to do so.

10 The County also disputes WilTel’s assertion that requiring telecommunications
11 companies to keep the status quo when they tear up the roads is not a prohibition on
12 interstate commerce. The County notes that under 42 U.S.C. § 253(b) [probably referring
13 to 47 U.S.C. § 253(b)], “Nothing in this section shall affect the ability of a State to impose,
14 on a competitively neutral basis and consistent with section 254 of this title, requirements
15 necessary to preserve and advance universal service, protect the public safety and welfare,
16 ensure the continued quality of telecommunications services, and safeguard the rights of
17 consumers.” The County maintains that protecting the “public safety and welfare” includes
18 requiring telecommunications companies to repair the roads after they install fiber optic
19 cable.

20 Finally, with regard to the fraud claim, the County asserts that it was not required to
21 issue the encroachment permit, as part of the area was in the Coastal Zone, and the
22 County has discretion to deny issuance of permits in the Coastal Zone under Mendocino
23 County Ordinance §§ 20.308.055 and 20.532.010.

24 At the hearing on WilTel’s motion, the court indicated its intention to grant summary
25 judgment. Counsel for the County asked the court to “stay” the ruling until after it had ruled
26 on the motion for leave to amend. The court requested the County to brief the question
27 whether there is any authority to support the County’s request for a stay.

28 In its supplemental brief, the County argues that leave to amend should be freely

1 granted unless there is some apparent reason for denying the motion – undue delay or bad
2 faith, repeated failure to cure deficiencies, undue prejudice to opposing party, or futility of
3 amendment. The County claims that none of these factors is present, asserting that the
4 factor that is afforded the most weight is prejudice to the opposing party, and that WiTel
5 has not established that it would be prejudiced by an amended pleading at this stage of the
6 litigation.

7 The County argues that it should not be penalized simply because WiTel chose to
8 file an early motion for summary judgment. The County argues that a party will be
9 permitted to amend its complaint, even where a motion for summary judgment has been
10 granted, citing two cases that it previously cited in its reply brief – Bennett v. Campbell, 564
11 F.2d 329 (9th Cir. 1997), and Oncology Therapeutics Network Connection v. Virginia
12 Hematology Oncology PLLC, 2006 WL 334532 (N.D. Cal., Feb. 10, 2006) – and one
13 additional case – Lindauer v. Rogers, 91 F.3d 1355 (9th Cir. 1996). The County does not
14 specifically address the question raised at the hearing – whether there is any authority to
15 support the court’s staying the ruling on the motion for summary judgment.

16 The court finds that the motion should be GRANTED. WiTel has not established
17 any of the factors that favor denying a motion for leave to amend. The fact that the court
18 granted the motion for summary judgment at the April 5, 2006, hearing does not preclude
19 the court from also granting leave to amend. No final judgment has been entered, and the
20 court retains jurisdiction over the case because no appeal has been taken.

21 With regard to the Rule 15 factors, WiTel has not established that the County
22 delayed unduly in seeking leave to amend, although there was some delay. The case was
23 filed in October 2005 and removed in November 2005, WiTel filed a motion for summary
24 judgment in February 2006, and the initial CMC was held one week later, during the first
25 week of March. Although WiTel’s motion for summary judgment was pending at that point,
26 the County did not seek to have its own motion, which it filed less than two weeks after the
27 CMC, heard on shortened time, and did not argue in its opposition to WiTel’s motion that if
28 the summary judgment were granted, leave to amend should also be granted.

1 Nevertheless, while it is true that the County could have filed its motion sooner, and should
2 have raised the issue of the proposed amended complaint in its opposition to WiTel's
3 motion, the court finds that this is not a sufficient ground to deny the County's motion.

4 More important to the court's decision is the fact that WiTel has not established that
5 it would be prejudiced if leave to amend were granted. In fact, its arguments are
6 contradictory. In discussing delay, WiTel notes that the cases that have found that seeking
7 leave to amend is improper while a motion for summary judgment is pending were all cases
8 in which discovery was closed or nearly closed. But WiTel argues that the fact that
9 discovery had not closed when the County filed its motion is irrelevant to that analysis, as
10 discovery will not produce any more facts because the County has all the facts already.

11 In discussing prejudice, however, WiTel asserts that it will be severely prejudiced if
12 leave to amend is granted because of all the new discovery that the amendment will
13 necessitate. WiTel also asserts that granting leave to amend will probably even create a
14 need for alteration of the pretrial schedule, and will certainly prove costly for WiTel.
15 However, WiTel never mentions the fact that discovery had not only not closed when the
16 County filed its motion on March 15 – it had barely begun. Given the early stage of the
17 case, the court finds no appreciable prejudice to WiTel in the filing of an amended
18 complaint.

19 Numerous Ninth Circuit decisions hold that where a motion for summary judgment is
20 pending, and discovery has closed, it is not an abuse of discretion to deny a motion for
21 leave to amend. Most of these cases rely on Roberts v. Arizona Bd. of Regents, 661 F.2d
22 796, 798 (9th Cir. 1981) (finding no abuse of discretion in denial of motion for leave to
23 amend, where district court made specific finding of prejudice to opposing party, noting that
24 plaintiff attempted to raise new claim "at the eleventh hour, after discovery was virtually
25 complete and the [defendant's] motion for summary judgment was pending before the
26 court").

27 On the other hand, in Ferris v. Santa Clara County, 891 F.2d 715 (9th Cir. 1989), the
28 Ninth Circuit held that "leave to amend following summary judgment may be granted at the

1 discretion of the court.” Id. at 719 (citing Nguyen v. United States, 792 F.2d 1500, 1503
2 (9th Cir.1986). That rule applies, however, only so long as a final judgment has not been
3 entered. Where a final judgment has been entered, amendments to pleadings may be
4 made only if no appeal has been taken from the judgment, as the taking of an appeal
5 divests the district court of jurisdiction.

6 The County cites Lindauer for the proposition that “[o]nce a final judgment has been
7 entered, the court can grant a motion to amend complaint if relief from the judgment is
8 given.” In Lindauer, the district court had granted summary judgment for the defendant and
9 had dismissed the action with prejudice, when plaintiffs filed a Rule 15(a) motion for leave
10 to amend the complaint. The district court denied the Rule 15(a) motion. The Ninth Circuit
11 affirmed, holding that once a judgment has been entered in a case, a motion to amend the
12 complaint can be entertained only if the judgment is first reopened under a motion brought
13 under Rule 59 or Rule 60. Lindauer, 91 F.3d at 1357.

14 To the extent that the County is arguing that the court can continue to consider the
15 pending motion for leave to amend so long as judgment has not been entered (even though
16 summary judgment has been granted), then Lindauer lends some support to the County’s
17 position.

18 The other two cases on which the County relies are not relevant to the question
19 posed by the court, though they do provide support for considering a motion for leave to
20 amend while a summary judgment motion is pending. In Bennett, the plaintiff filed a
21 Bivens action in December 1975 against three federal officials. On April 9, 1976, the
22 original defendants filed a motion for summary judgment. On April 21, 1976, the plaintiff
23 filed a motion for leave to amend, to add four lesser federal officials as defendants. The
24 district court granted summary judgment, and then denied the motion for leave to amend as
25 moot. The Ninth Circuit affirmed the order granting summary judgment, but reversed the
26 order denying leave to amend. Bennett, 564 F.2d at 331-32.

27 The court found that the claims against the four lesser officials could not be
28 considered moot, because the evidence in the record related only to the original three

1 defendants, and the record as to the proposed new defendants was limited to the
2 allegations in the complaint (the proposed amended complaint), which the court was
3 obligated to accept as true for purposes of the appeal. Bennett, 564 F.2d at 332. Although
4 the facts in Bennett are distinguishable from the facts in the present case, the ruling shows
5 that a first-filed motion for summary judgment does not necessarily extinguish a later-filed
6 request for leave to amend.

7 In Oncology Therapeutics, the plaintiff filed a motion for leave to amend while a
8 summary judgment motion was pending. The defendants argued that the pending motion
9 for summary judgment was a factor that weighed against granting leave to amend. The
10 court noted that the Ninth Circuit has found that it is within the trial court's discretion to
11 grant leave to amend after a motion for summary judgment has been filed (citing Ferris),
12 but also noted that judges in this district had indicated that where a motion for summary
13 judgment is pending, leave to amend might be denied where the plaintiff had not made a
14 "strong showing" to support the amendment. Oncology Therapeutics, 2006 WL 334532 at
15 *13.

16 The court concluded that the fact that a summary judgment motion was pending was
17 certainly a factor to consider, but only where it reflected that the case was at an advanced
18 stage, with substantial discovery completed – in other words, that it was a factor to
19 consider in looking at possible prejudice to the defendant. The court noted that the plaintiff
20 had advised before the defendants filed the motion for summary judgment that it intended
21 to seek to amend the complaint, and the court had set up a briefing schedule to
22 accommodate both motions. The court concluded that "[t]his is not a case in which plaintiff
23 saw defendant's motion for summary judgment, saw the 'writing on the wall,' and then
24 sought to amend to circumvent the inevitable." Id. at *14.

25 In the present case, the County did not advise the court that it intended to seek
26 leave to amend. Moreover, it is possible that the County simply "saw the writing on the
27 wall" when WiTel filed its motion for summary judgment, and filed the motion for leave to
28 amend in an attempt to avoid dismissal of the case. The Ninth Circuit has emphasized that

1 a motion for leave to amend “is not a vehicle to circumvent summary judgment.” Schlacter-
2 Jones v. Gen’l Tel. of Calif., 936 F.2d 435, 443 (9th Cir. 1991), overruled on other grounds,
3 Cramer v. Consol. Freightways, Inc., 255 F.3d 683, 692-93 (9th Cir. 2001) (en banc).
4 Nevertheless, in view of the fact that the motion for summary judgment was filed before
5 discovery had even begun, and the fact that discovery cut-off is not until November 17,
6 2006, the court finds that the leave to amend should be granted.

7 Finally, with regard to futility of amendment, the claim for injunctive relief is
8 dependent on the viability of the claim of “violation of law.” WilTel has not persuasively
9 argued that the “violation of law” claim cannot state a claim – and the parties’ arguments
10 suggest the existence of factual disputes with regard to whether the damage to the roads
11 was “cosmetic” or “structural.” To the extent that the fraud cause of action is not pled with
12 particularity, that can be remedied. The claims the County seeks to add are not clearly
13 futile, and the court finds that futility provides no basis upon which to deny the motion.

14 CONCLUSION

15 In accordance with the foregoing, the motion for summary judgment on the first
16 cause of action is GRANTED, and the motion for leave to file an amended complaint is
17 GRANTED (except as to the proposed first cause of action). The amended complaint shall
18 be filed no later than May 1, 2006.

19 The date for the hearing on the County’s motion, previously set for Wednesday, April
20 19, 2006, is VACATED.

21
22 **IT IS SO ORDERED.**

23 Dated: April 18, 2006



24 _____
PHYLLIS J. HAMILTON
United States District Judge